

Office of the Attorney General
State of North Dakota

Opinion No. 84-36

Date Issued: November 14, 1984

Requested by: J. O. Wigen
Insurance Commissioner

--QUESTION PRESENTED--

Whether the term 'custodial care' as used in Section 26.1-04-03(9)(1) of the North Dakota Century Code may be considered care which is both primarily for personal needs and care which is primarily without the supervision of a registered nurse or a licensed practical nurse.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that the term 'custodial care' as used in Section 26.1-04-03(9)(1), N.D.C.C., may be considered care which is both primarily for personal needs and care which is primarily without the supervision of a registered nurse or a licensed practical nurse.

--ANALYSIS--

Section 26.1-04-03(9)(1), N.D.C.C., contains the following language:

26.1-04-03. UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES DEFINED. The following are unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

9. Unfair claim settlement practices. Committing any of the following acts, if done without just cause and if performed with a frequency indicating a general business practice:

1. Providing coverage under a policy for confinement to a nursing home and refusing to pay a claim when a person covered by such a policy was confined to a hospital for three days or more and the person's physician ordered confinement for care other than custodial care. Custodial care means care which is primarily for the purpose of meeting personal needs without supervision by a registered nurse or a licensed practical nurse.

Section 1-02-03, N.D.C.C., states, in part, that 'technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or as are defined by statute, shall be construed according to such peculiar and appropriate meaning or definition.' Also, statutes are to be construed liberally with a view to effecting its objects and to promoting justice. Section 1-02-01, N.D.C.C., *Hughes v. State Farm Mutual Auto. Ins. Co.*, 236 N.W.2d 870 (N.D. 1975). 'Custodial care' has been defined in Section 26.1-04-03(9)(1), N.D.C.C.; however, it is the language of that definition which has created the question of interpretation.

This section has not been judicially construed. The legislative history of this section does not contain any references to the definition of 'custodial care,' nor any details or explanation of the language used in that definition.

The federal courts, while not specifically construing a statute similar to ours but rather the Medicare Act, have in the absence of a definition of 'custodial care' derived different standards such as the 'services received standard' and the 'condition of the patient standard,' looking more closely at the care or services received.

One logical position, with regard to the definition of 'custodial care,' was set out in *Samuels v. Weinberger*, 379 F. Supp. 120 (S.D. Ohio 1973).

This seems to be a common sense view of what 'custodial care' is. It is care that could be administered by a layman, without any possible harm to the health of the one in custody. That is the simple reason why payment for it is not covered in a law the purpose of which is to pay medical benefits to the aged. This view of 'custodial care' is also in agreement with the definition of 'custodial' as found in Webster's Third New International Dictionary (1976) i.e., 'relating to or marked by guardianship or maintaining safely.' Thus mere 'custodial care' refers quite simply to guardianship for convenience that has no significant relation to medical care of any type. 379 F. Supp. 120, 123.

This approach to custodial care does not hinge on who administers the treatment when that treatment or care could be administered by a layman.

Another consideration used by the federal courts is the 'purpose of the treatment.' In *Coe v. Secretary of Health, Education, and Welfare*, 502 F.2d 1337 (4th Cir. 1974), the court relied on the following definition of 'custodial care' as found in Webster's New International Dictionary at 559 (3d ed. 1964):

. . . marked by or given to watching and protecting rather than seeking to cure (for example) custodial care rather than a therapeutic program. 502 F.2d 1337, 1340.

Again, no distinction is made on the basis of who administers the care, but rather on what the intent of the care is.

There is another element, which often forms the basis for a judicial decision, which is essentially a determination as to whether the care provided the patient is care which can only be supplied by a skilled professional in an institutional setting. If it is treatment which need not be provided in an institutional setting by trained and skilled professional personnel, it is custodial. See *Renzio v. Secretary of Health, Education, and Welfare*, 403 F. Supp. 917, 920 (E.D. Mich. 1975); *Skoloff v. Richardson*, 383 F. Supp. 234, 237 (E.D. N.Y. 1973). Although the definition in Section 26.1-04-03(9)(1), N.D.C.C., defined what is custodial care, rather than what it is not, it is important to note that this last judicial test would readily permit care by a professional, which was only for the personal needs of the patient, to be considered custodial care since it was not care that only the professional could provide in an institutional setting.

The Legislature did not intend to create an illogical statute. Consequently, the statute should be given a rational and sensible construction.

There is no manifest intent in the language of the statute by the Legislature to make may refusal of a nursing home claim, simply by virtue of that refusal, an unfair claims practice. Care which is only for the patient's personal needs is custodial care and should be considered so whether administered by a registered nurse or a licensed practical nurse. There is no intent in this law making the denial of a claim based on such an interpretation, an unfair claims practice. Care which to some degree is given for other purposes than meeting the personal needs of a patient, but is primarily for the purpose of meeting those personal needs can also be considered custodial care under the North Dakota definition and should be so considered whether administered by a registered or licensed practical nurse. Certainly, the requirements that a professional may administer the care or treatment is a critical factor to be considered, but it is not totally determinative of what is the level of care.

The only logical construction of that section would be one which permits the denial of a claim as custodial even where a professional, such as a registered nurse or a licensed practical nurse, administers care which is primarily for the purpose of meeting personal needs.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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